(29,642)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 339

SOUTHERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF DURHAM, NORTH CAROLINA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX

	Original	Print
Petition for writ of error	1	1
Writ of error	5	3
Citation and service	8	4
Assignment of errors	9	5
Bond on writ of error (omitted in printing)	13	7
Record from superior court of Durham County	16	7
Summons and service	16	7
Complaint	17	8
Exhibits 1 to 8, Inclusive, to Complaint—Traffic census tables	26	14
Separate answer of Southern Railway Co	34	22
Separate answer of Norfolk & Western Railway Co	40	26
Separate answer of Seaboard Air Line Railway	46	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1923

	Original	Print
Writ of mandamus	52	35
Exceptions	59	39
Assignments of error	62	41
Stipulation as to Exhibit No. 1	64	43
Bond on appeal	65	44
Stipulation for amendment of case on appeal	66	45
Clerk's certificate	67	45
Proceedings in supreme court of North Carolina	68	46
Docket entries	68	46
Opinion, Clark, C. J.	69	46
Judgment	80	54
Clerk's certificate	81	54
Exhibit in Evidence—Map of proposed overhead bridge, Chapel Hill Street, Durham, N. C.	82	55

[fol. 1] **IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922**

No. —

SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, and SEABOARD AIR LINE RAILWAY COMPANY, Appellants,

vs.

CITY OF DURHAM, Appellee

PETITION FOR WRIT OF ERROR—Filed Apr. 25, 1923

To the Honorable the Chief Justice of the North Carolina Supreme Court:

Your petitioners, Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, respectfully represent:

That this proceeding was instituted in the Superior Court of Durham County, North Carolina by the City of Durham for a mandamus to enforce an ordinance requiring the three railroad companies to eliminate the grade crossing of Chapel Hill Street over the tracks of the railways in the City of Durham, North Carolina, by constructing an under-pass, below the tracks, for the highway. The three defendants, petitioners here, are steam railroad systems engaged in interstate commerce. The tracks crossing Chapel Hill Street are part of their interstate railroad systems. The Norfolk and Western Railway Company filed an answer making the defense that an overhead bridge would be the appropriate remedy and that "before the ordinance was passed" that Company submitted plans and detailed specifications and "made proposal of a plan for an overhead structure which would have carried the highway over the tracks of the three railways". The Southern and Seaboard in their answers also set up that an overhead bridge would be an equally effectual solution of [fol. 2] the problem of grade separation with the proposed under-pass and would not be wasteful and uneconomic. The first cost of the overhead structure would be, as disclosed by the answer, $160,000.00 as contrasted with $258,800.00 for the under-pass. Circumstances of fact are also detailed in the answers showing the other advantages of convenience and safety which the overhead structure would have had as contrasted with the under-pass required by the ordinance.

In addition to other defenses the answers raise by express averment these three Federal defenses:

I. The ordinance in requiring the construction of an under-pass is arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States:

II. The ordinance is an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3, of the Constitution of the United States:

III. The ordinance in requiring an under-pass is void for that compliance therewith will not be efficient and economical management and reasonable expenditure for structures required by subdivision 2, Section 15a of the Act of Congress known as the Act to Regulate Commerce, which section was added to that Act by one of the amendments of the Transportation Act of 28 February, 1920.

The Superior Court held as matter of law that the answers raised no issues of fact and if true, did not state defenses. A trial to a jury on the issues of fact was denied: the Superior Court having made the finding of "facts from the pleadings" though the facts showing the existence of the three Federal defenses were uncontradicted, the Superior Court had the view that those facts, if proven, would not constitute a defense. A writ of alternative mandamus was awarded and on appeal the judgment awarding the writ was affirmed April [fol. 3] 4, 1923, by the North Carolina Supreme Court on the grounds that "no issues of fact are raised by the answer"; that "the reasonableness of a city ordinance is a question of law for the court"; and that sufficient facts were not "alleged to show that the ordinance is unreasonable and oppressive".

That these petitioners are aggrieved by the said final judgment entered against them by the North Carolina Supreme Court in the above-described case wherein your petitioners were appellants and the City of Durham, North Carolina, was appellee:

That the judgment aforesaid of the North Carolina Supreme Court is the judgment of the highest Court in said State in which said cause could be heard and determined, and the record of said judgment and of the proceedings in said cause is still in the said North Carolina Supreme Court:

That the said final judgment of the North Carolina Supreme Court was entered in a cause wherein was drawn in question the validity of an ordinance of the City of Durham in said State dated 20, March, 1922, and of a judgment and order of the Superior Court of Durham County, North Carolina, awarding mandamus to enforce said ordinance, the validity being drawn in question, on the grounds that the said ordinance and the judgment enforcing the same were repugnant to Article I, Section 8, Paragraph 3, of the Constitution of the United States, being the Commerce Clause: to sub-division 2 of Section 15a of the Act of Congress known as the Act to Regulate Commerce as amended by the Transportation Act of 28 February, 1920: and to the Fourteenth Amendment of the Constitution of the United States: and the decision was in favor of the validity of the State Statute and authority so drawn in question and said judgment is against the constitutional rights claimed by these petitioners and is contrary to the Constitution of the United States: and is also against the validity of a right claimed by the [fol. 4] petitioners under a Federal Statute: all of which will more

fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of North Carolina to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment reversed. And your petitioners will every pray.

Southern Railway Company, By Manly, Hendren & Womble, L. E. Jeffries, Attorneys. Norfolk and Western Railway Company, By W. B. Guthrie, Theodore W. Reath, Attorneys. Seaboard Air Line Railway Company, By James F. Wright, Fuller & Fuller, Attorneys. April 19, 1923.

Approved: Walter Clark, C. J.

[File endorsement omitted.]

[fol. 5] WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Chief Justice of the North Carolina Supreme Court, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said North Carolina Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, and the City of Durham, in which the Railways were appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws [fols. 6 & 7] of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-

cerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal of the United States District Court, Eastern Division.]

S. A. Ashe, Clerk of the District Court of the United States.

Allowed by Walter Clark, Chief Justice of the North Carolina Supreme Court.

[fol. 8] [File endorsement omitted.]

CITATION AND SERVICE—Filed Apr. 25, 1923

UNITED STATES OF AMERICA, ss:

To the City of Durham, North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of North Carolina, wherein Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Associate Justice of the North Carolina Supreme Court, this the 25th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

Walter Clark, Chief Justice of North Carolina Supreme Court.

Service accepted and receipt of copy acknowledged.

S. C. Chambers, Atty. for City of Durham. This April 27, 1923.

[fol. 9] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. —

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the said Southern Railway Company, Norfolk and Western Railway Company, and Seaboard Air Line Railway Company, Appellants, and respectfully submit that in the record, proceedings, decision and final judgment of the North Carolina Supreme Court in the above entitled matter there is manifest error in this to-wit:

First. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court of Durham County, North Carolina, entered September 16, 1922, which had upheld the ordinance of the City of Durham of the 20th of March, 1922, granting mandamus to compel these Petitioners to construct and maintain an under-pass across their tracks at Chapel Hill Street crossing in the City of Durham, North Carolina.

Second. The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the facts set up in the answers of the three Petitioners did not constitute a defense by the averments that the under-pass required by the ordinance was an unreasonable requirement so [fol. 10] oppressive and arbitrary as to deprive defendants of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third. The North Carolina Supreme Court erred in holding that the said ordinance of the City of Durham upheld by the judgment of the Superior Court was not, under the facts set up in the answers of petitioners, arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3, of the Constitution of the United States.

Fourth. The North Carolina Supreme Court erred in holding by its judgment of April 4, 1923, as a matter of law and without evidence, that the following facts set up in the answers of the three petitioners, viz., that proposal was made to afford the relief by the construction of an overhead structure at a cost of approximately one hundred thousand dollars less than the cost of the under-pass required by the ordinance and that the overhead structure would cause the minimum property damage and eliminate serious drainage difficulties and would provide a safer highway than the viaduct directed to be constructed by the said ordinance,—did not constitute a defense to the requirement of an under-pass by the ordinance of the City of Durham, in that compliance with said ordinance was

unreasonable and not efficient, economical management and not such a reasonable expenditure as required by Section 15(a), subdivision 2 of the Act of Congress known as the Act to Regulate Commerce, as amended by the Transportation Act of February 28, 1920.

Fifth. The Supreme Court of North Carolina erred in holding that no "issue of fact" was raised by the averments in the answer of petitioners that the action of the City of Durham in passing the [fol. 11] ordinance was arbitrary, unreasonable, and oppressive, in that a bridge offered to be constructed affording relief from the danger could be constructed for the sum of one thousand dollars less than the under-pass and that said proposed overhead bridge would be safer, avoid drainage difficulties, and do less property damage; and by this holding the Supreme Court of North Carolina deprived defendants of the defense plead that said ordinance was so arbitrary, unreasonable, and oppressive as to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Sixth. The North Carolina Supreme Court erred in declining to hold, as contended for by the petitioners, that the ordinance is void for that compliance with the same would not be that efficient and economical management and reasonable expenditure for structure by the carriers as required by sub-division 2, Section 15(a), of the Interstate Commerce Act, as amended by the Transportation Act, and holding that nothing in the Transportation Act contravened the right of the State to legislate in the interest of public safety under the facts shown in the pleadings herein and in the manner set forth in the said ordinance of the City of Durham.

Seventh. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that an overhead bridge would have been reasonable and that the said under-pass was unreasonable in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Paragraph 3.

[fol. 12] Eighth. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reasonable; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was inefficient and uneconomic management and an unreasonable expenditure for structures in violation of Section 15 (a), sub-division 2, of the Act of Congress known as the Act to Regulate Commerce.

Ninth. The North Carolina Supreme Court erred in affirming the judgment of the Superior Court which had found "from the pleadings" that said under-pass required by said ordinance was reason-

able; this finding being in disregard of the uncontradicted facts set forth in the answers which establish the conclusion of law that the under-pass was arbitrary and unreasonable and not due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Southern Railway Company, By Manly, Hendren & Womble. L. E. Jeffries, Attorneys. Norfolk and Western Railway Company, By W. B. Guthrie, Theodore W. Reath, Attorneys. Seaboard Air Line Railway Company, By James F. Wright, Fuller & Fuller, Attorneys. April 19, 1923.

[fols. 13-15] BOND ON WRIT OF ERROR [Amount $1,000.00; approved, Clark, C. J.; omitted in printing]

[fol. 16] TRANSCRIPT OF APPEAL TO SUPREME COURT OF NORTH CAROLINA

Tenth District

No. —

CITY OF DURHAM

v.

SOURTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY

Before Connor, J., Defendants Appealed

Be it remembered, that on the 16th day of August, 1922, the City of Durham, sued and prosecuted out of the Superior Court of Durham County a summons in these words:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SUMMONS AND RETURN

The State of North Carolina to the Sheriff of Durham County, Greeting:

You are hereby commanded to summons Southern Railway Company; Norfolk & Western Railway Company and Seaboard Air Line Railway Company, the defendants above named, if they be

found within your county, to appear before Hon. George W. Connor, Judge of the Superior Court, at Chambers, at Hillsboro, N. C., on the 31st, day of August, 1922 at 11 o'clock A. M., an answer the complaint which has been deposited in the office of the Clerk of the Superior Court of said county, and for such other and further proceedings as may be had in the above entitled action. And let de-
[fol. 17] fendants take notice, that if they fail to answer said Complaint within the time prescribed by law, or fail to appear, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

Herein fail not, and of this summons make due return.

Given under my hand, this 16 day of August, 1922.

W. H. Young, Clerk Superior Court, Durham County.

And on the return day of said summons, to-wit, on the 31st day of August, 1922, at the Court House in Durham, before the Honorable W. H. Young, Clerk Superior Court of said County, John F. Harward, Sheriff of said County, made the following return on said summons:

Received. August 16, 1922. Served August 16, 1922 by leaving a copy of the within summons and Complaint with W. A. Gattis Agent of the Southern Railway Company, at Durham, N. C. W. H. Pritchard, Agent of the Norfolk and Western Railway Company, at Durham, N. C.

R. L. Montgomery, Agent of the Seaboard Air Line Railway Company, at Durham, N. C.

Jno. F. Harvard, Sheriff, Durham Co.

And thereupon the said the City of Durham, by its attorneys, S. C. Chambers, W. J. Brogden and J. S. Manning, came and complained as follows:

North Carolina,
Durham County:

In the Superior Court

(Title of Cause)

Complaint

The plaintiff for a complaint herein alleges:

1. That it is a municipal corporation, duly created, organized and existing under and by virtue of the laws of the State of North Carolina; that among other powers contained in its charter, delegated to
[fol. 18] its governing authority, to-wit: its City Council, and expressly conferred upon and possessed by plaintiff, as will appear by reference to Section 10 of its charter, is the following:

"The City Council shall have full power and authority, except as otherwise provided for in this act to exercise all of the powers confer-

red upon and delegated to the City of Durham by this charter and the laws of North Carolina. The City Council shall have power to make such ordinances as it may deem necessary for the proper government of the City and to promote and safeguard the health, morals and safety and general welfare and convenience of the public. The City Council may provide for the enforcement of such ordinances, in such manner as it may think best, by fine, imprisonment, or otherwise."

2. That Chapel Hill Street is one of the main streets or th-roughfares located in said City, which street runs in an easterly and westerly direction, the western portion of which connects with the Chapel Hill Boulevard of the State High way leading to the Town of Chapel Hill, Orange County. That said street, except for several hundred feet on either side of the right-of-way hereinafter referred to, has recently been permanently paved, and said street is the leading th-roughfare connecting the northern and southern portions of said city, the said street being used and occupied by the Durham Public Service Company with its tracks, over which it operates a line of street railway.

3. That the defendant, the Southern Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue of law, operating a line of steam railway over its tracks on its right-of-way, two hundred feet in width, through the City of Durham, crossing said Chapel Hill Street at grade, near the center of said city.

That the defendant, Norfolk and Western Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue [fol. 19] of law, operating a line of steam railway over its tracks, located on a portion of the said right-of-way of its co-defendant, Southern Railway Company, which said tracks cross said Chapel Hill Street at grade at the point hereinbefore mentioned.

The *the* defendant, Seaboard Air Line Railway Company is now, and was at the times hereinafter mentioned, a corporation duly created, organized, existing and doing business under and by virtue of law, operating a line of steam railway over its tracks located on a portion of said right-of-way of its co-defendant Southern Railway Company, which said tracks cross said Chapel Hill Street at grade at the point hereinbefore mentioned.

4. That within a radius of approximately eight hundred yards of said Chapel Hill Street grade crossing are located the freight depots of the defendant, Southern Railway Company, the defendant, Norfolk & Western Railway Company, and the defendants, Seaboard Air Line Railway Company; a large tobacco plant of the Liggett & Myers Tobacco Company, known as the "Duke Plant;" the tobacco factory known as the "Bull Durham Plant;" The Durham Public Service Company's ice and power plant; the Austin-Heaton Flour

Mill; the Marvin Carr Silk Hosiery Mill, all of which depots and industries are served with side or spur tracks connecting with the main line tracks of defendants and over which main tracks and across said grade crossing, at all times of day and night, are constantly moved and switched numerous freight trains, cars and locomotives, for serving said industries and freight depots, all of which said train and car movements are in addition to the many through passenger and freight trains moving over and along the main tracks of defendant's lines, and over said grade crossings.

5. That the records on file in the office of the Clerk of the Superior Court, for Durham County, show that on or about October 4th, 1917 one W. P. Budd, a citizen of Durham, and an officer of the Budd-Piper Roofing Company, while approaching said crossing [fol. 20] in an automobile, was seriously hurt and injured, while jumping from said automobile in an endeavor to avoid collision with a moving train over said grade crossing; that on or about February 11th, 1918, one Dr. S. Rapport, a citizen of Durham, while attempting to drive an automobile over said crossing, collided with a moving train, resulting in great damage to said automobile; that on or about September 22nd, 1920 one J. D. Inscore, a citizen of Durham, while attempting to drive an automobile over said crossing had said automobile demolished by a freight train which had been "kicked" into said automobile. That in the summer of 1917 a horse, the property of one J. Sid Perry, a citizen and merchant of Durham, while said horse, hitched to a wagon, was being driven over said grade crossing was struck by a moving train, the horse being instantly killed and the wagon demolished. That in the summer of 1919 one M. E. Newsom, a former Mayor of the City of Durham, while attempting to drive an automobile over said crossing, collided with a moving train resulting in the said automobile being completely demolished. That on or about December 5th, 1921 one Forrest Pollard, a citizen and resident of Durham, while attempting to drive an automobile over said crossing collided with a moving passenger train, resulting in one of the rear wheels of said automobile being smashed and torn from said motor vehicle.

6. That said governing authority, finding that that continued maintenance of said grade crossing is a great inconvenience to the whole people, seriously interrupts and impedes street traffic and is dangerous to public travel, employed an expert consulting engineer to advise said governing authority if it was practicable and feasible to change or alter said grade crossing, in order that same might be made safe and convenient for the travelling public, and said engineer, after full and careful investigation, recommended to said City Council that said grade crossing could be best made safe by separating the street and railroad grades and by placing the street underneath the railroad tracks by means of an underpass, and in submit- [fol. 21] ting said recommendation and report said engineer presented plans and estimated cost of the construction of said underpass.

That thereafter said City Council invited defendants to have their representatives meet with it and its representatives with a view to

having said defendants remedy said grade crossing by the building of an underpass in place thereof. That many conferences were held by and between the engineers of the several parties and later by and between certain officers of the defendants and said City Council, all of which said conferences terminated unsatisfactorily to plaintiff, said defendants at no time indicating a willingness or readiness to meet the immediate wishes and requets of plaintiff.

7. That thereafter and on the 20th day of March 1922, the City Council, the governing authority of plaintiff, duly adopted an ordinance in words and figures as follows:

"Whereas, The Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,

"Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines, cars and trains, both freight and passenger, is a constant practice during the hours of day and night, all of which is in addition to the movement of through freight and passenger trains over said tracks, and,

"Whereas, approimately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of 7 o'clock A. M., and 7 o'clock P. M., and,

[fol. 22] "Whereas, the City Council finds and so declares that the continued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having opened negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer, and the engineering representatives of the said Railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plans for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of a bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore,

"Ordained by the City Council of the City of Durham,

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and oc-asionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the [fol. 23] elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade, are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the center supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall be not less than six feet wide in the clear; that the abutment walls shall set flush with or back of the build ng lines as established by *by* the City Engineer, that the finished surface of Chapel Hill Street at the ape*r* of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from the adoption of this ordinance and same shall be completed within 280 working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

That immediately after the adoption of said ordinance, a copy of same was forwarded to each defendant by the City Clerk of plaintiff.

[fol. 24] 8. That the City Council, the governing authority of plaintiff, caused to be made a record of the street traffic over and

along said street and across said grade crossing, together with the number of times and lengths thereof said crossing was blocked by trains, cars and engines of the defendants, which record is herein referred to as a traffic census, and which census shows the volume of said traffic and the number of times and lengths thereof said crossing was so blocked during the hours of 5 A. M., and 11 P. M., on the 5th, 22nd and 24th days of June and the 8th, 10th, 11th, 12th and 13th days of July, 1922, that copies of said census are herewith attached marked Exhibits 1 to 8 inclusive, and to which reference is made. That from said traffic census it will appear that approximately 214 street cars, 2,629 motor vehicles, also 427 horse drawn vehicles and 4,355 pedestrians, and persons riding bicycles, use said crossing daily, and further that said crossing is blocked approximately 111 times and for two hours or one-ninth of each day during said hours.

9. That more than sixty days have elapsed since the enactment of said ordinance, but said defendants have failed, refused and still refuse to obey the provisions of said ordinance, or comply with the terms thereof.

Wherefore, plaintiff prays that a writ of mandamus be issued and directed to said defendants directing defendants to immediately comply with the provisions of the ordinance hereinbefore set out.

For the costs of this action.

S. C. Chambers, W. J. Brogden, J. S. Manning, Attorneys for Plaintiff.

North Carolina,
Durham County:

J. M. Manning, being duly sworn, says: that he is Mayor of the City of Durham, the plaintiff in the within entitled action, that he has read the complaint and that the same is true of his knowledge [fol. 25] except as to the matters and things therein mentioned on information and belief and as to those he believes it to be true.

Jno. M. Manning.

Sworn to and subscribed before me this 16th day of August 1922. W. J. Holloway, Notary Public. (Notarial Seal.) My commission expires 15th day of January, 1924.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 5, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	...	...	...	...	7	4	1	3	28	12	...	..	..
6 to 7 A. M.....	7	6	6	6	6	4	53	12	19	10	179	343	1	0	40
7 to 8 A. M.....	6	7	15	8	8	4	50	27	19	20	174	63	5	6	35
8 to 9 A. M.....	6	6	15	6	22	4	70	30	39	15	154	59	1	1	05
9 to 10 A. M.....	6	5	6	9	22	20	53	43	32	28	112	66	12	17	45
10 to 11 A. M....	5	6	5	9	13	12	66	30	23	27	69	119	15	21	30
11 to 12 A. M....	7	7	11	7	19	14	68	46	22	22	102	145	16	17	00
12 to 1 P. M.....	7	6	4	3	10	16	84	76	7	13	155	230	9	14	45
1 to 2 P. M.....	6	6	7	13	16	17	62	61	14	10	135	98	13	24	00
2 to 3 P. M.....	7	5	16	15	13	12	67	54	14	15	87	61	17	24	55
3 to 4 P. M.....	5	6	11	10	5	9	74	58	16	14	110	59	8	9	20
4 to 5 P. M.....	9	8	11	13	6	6	105	42	10	11	439	159	8	7	50
5 to 6 P. M.....	6	6	6	6	11	10	56	62	12	19	75	185	12	15	50
6 to 7 P. M.....	5	6	6	4	6	11	62	96	9	11	92	280	3	2	30
7 to 8 P. M.....	6	6	...	...	5	6	84	68	8	6	167	84	6	10	30
8 to 9 P. M.....	6	6	...	...	1	4	72	54	3	2	103	86	4	4	30
9 to 10 P. M.....	5	5	...	...	...	...	51	31	...	1	39	95	4	8	00
10 to 11 P. M....	5	5	...	...	...	9	27	30	...	...	24	87	11	12	50
Totals	105	105	119	109	163	158	1,111	824	248	227	2,235	2,231	145	..	..
Grand Total.	210		228		321		1,935		475		4,466		145	3 h. 19 m. 35 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 22, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	4	1	1	6	2	5	5	4	1	36	16	2	1	20
6 to 7 A. M.....	6	6	6	2	8	2	58	14	18	8	146	492	4	5	50
7 to 8 A. M.....	7	7	5	11	8	7	41	25	21	11	130	32	2	1	30
8 to 9 A. M.....	6	7	5	9	11	7	56	34	22	16	144	41	7	13	20
9 to 10 A. M.....	6	5	11	15	16	16	61	51	22	10	81	52	9	7	20
10 to 11 A. M....	6	7	12	14	20	23	86	81	17	18	59	49	15	9	30
11 to 12 A. M....	6	5	22	17	15	14	110	91	16	15	88	102	16	13	50
12 to 1 P. M.....	6	6	7	8	7	5	134	117	13	12	117	153	8	8	15
1 to 2 P. M.....	5	7	11	17	22	15	134	92	17	8	88	75	5	3	55
2 to 3 P. M.....	8	6	12	12	12	9	68	45	8	8	95	53	9	9	30
3 to 4 P. M.....	6	6	9	8	12	8	80	35	16	7	77	65	1	2	40
4 to 5 P. M.....	7	7	14	7	10	8	60	40	10	14	308	107	7	10	45
5 to 6 P. M.....	6	6	9	3	3	6	72	52	12	11	49	182	9	10	40
6 to 7 P. M.....	6	7	5	5	5	11	57	98	3	8	93	213	3	4	30
7 to 8 P. M.....	6	6	1	...	3	3	107	83	7	6	112	95	2	2	35
8 to 9 P. M.....	6	6	1	...	1	1	83	73	4	4	122	92	2	1	00
9 to 10 P. M.....	6	6	1	...	2	1	80	67	3	1	38	92	2	1	20
10 to 11 P. M....	6	6	...	...	...	1	53	36	1	1	20	116	3	2	30
Totals	106	110	132	129	161	139	1,345	1,039	214	159	1,803	2,027	106	..	..
Grand Total.	216		261		300		2,384		373		3,830		106	1 h. 50 m. 20 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., June 24, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	1	...	...	...	7	1	6	4	22	14	...	..	..
6 to 7 A. M.....	6	6	6	4	5	2	48	18	20	10	121	379	2	..	30
7 to 8 A. M.....	6	6	21	13	22	12	97	56	28	11	158	55	5	5	10
8 to 9 A. M.....	7	7	12	5	22	9	127	80	16	17	159	44	4	5	20
9 to 10 A. M.....	6	6	10	9	23	21	80	63	15	13	100	64	4	4	10
10 to 11 A. M....	6	6	6	12	25	19	70	43	14	10	91	81	5	6	10
11 to 12 A. M....	6	7	5	8	20	16	62	40	18	9	175	116	11	15	00
12 to 1 P. M.....	5	5	7	5	20	20	83	90	18	6	283	306	7	8	15
1 to 2 P. M.....	4	6	3	9	18	14	66	58	11	8	161	208	9	12	30
2 to 3 P. M.....	6	6	1	5	16	9	78	53	32	22	198	95	13	15	30
3 to 4 P M.....	6	6	4	4	11	10	76	53	17	25	159	118	11	23	30
4 to 5 P. M.....	6	6	5	5	6	6	65	55	16	21	135	125	8	9	40
5 to 6 P. M.....	7	6	1	3	6	5	84	71	22	18	130	233	4	4	50
6 to 7 P. M.....	6	6	3	1	5	9	76	100	8	7	150	263	6	6	05
7 to 8 P. M.....	6	6	1	1	13	11	141	65	10	14	305	173	...	..	..
8 to 9 P. M.....	6	6	1	2	3	6	128	105	3	9	320	199	2	1	05
9 to 10 P. M.....	5	5	1	2	3	4	101	97	7	5	93	376	2	1	10
10 to 11 P. M....	6	6	...	...	5	2	76	65	...	2	35	232	...	..	..
Totals	101	105	88	88	223	175	1,465	1,113	261	211	2,795	3,081	93	..	..
Grand Total.	206		176		398		2,578		472		5,876		93	1 h. 58 m. 45 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 8, 1922

3—339

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	3	1	1	6	3	5	2	2	2	29	20	1	..	50
6 to 7 A. M.....	6	7	8	1	10	6	56	6	13	9	492	61	3	2	25
7 to 8 A. M.....	6	6	3	4	19	12	36	27	15	4	131	33	8	11	25
8 to 9 A. M.....	6	7	10	4	16	15	45	30	17	13	155	60	4	3	30
9 to 10 A. M.....	7	6	6	6	18	14	65	39	32	14	93	73	7	6	15
10 to 11 A. M....	6	7	7	10	18	10	67	44	21	18	70	82	8	6	35
11 to 12 A. M....	6	6	8	5	13	13	60	48	24	37	132	131	8	6	40
12 to 1 P. M.....	6	6	5	3	9	13	63	70	16	31	200	300	14	11	30
1 to 2 P. M.....	6	5	2	5	14	11	72	50	20	18	165	165	15	13	30
2 to 3 P. M.....	6	6	3	4	20	10	82	35	22	16	211	96	4	5	35
3 to 4 P. M.....	7	6	5	3	16	17	72	53	22	14	130	148	12	14	40
4 to 5 P. M.....	5	6	6	4	16	12	93	72	22	17	216	184	8	9	35
5 to 6 P. M.....	6	5	1	3	19	15	76	76	15	22	75	142	5	3	20
6 to 7 P. M.....	4	5	2	3	10	12	69	103	5	22	84	190	1	..	00
7 to 8 P. M.....	6	6	...	1	4	5	103	81	8	17	209	133	5	2	30
8 to 9 P. M.....	6	6	1	...	7	5	70	74	1	11	162	154	1	..	25
9 to 10 P. M.....	6	5	...	...	1	3	56	76	1	5	44	261	3	5	25
10 to 11 P. M....	6	6	...	...	2	4	44	50	...	2	21	193	1	2	5
Totals	102	104	68	57	218	180	1,134	936	256	272	2,619	2,426	108	106	15
Grand Total.	206		125		398		2,070		528		5,045		...	1 h. 46 m. 15 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 10, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	1	4	...	...	5	3	5	7	5	1	29	22	...	..	..
6 to 7 A. M.....	6	6	5	6	6	3	47	31	19	10	410	160	1	..	35
7 to 8 A. M.....	6	6	5	9	17	15	44	23	16	5	159	50	11	12	15
8 to 9 A. M.....	6	6	13	12	20	13	60	33	24	12	146	72	4	3	55
9 to 10 A. M.....	6	7	8	6	18	14	51	43	18	19	78	85	9	9	25
10 to 11 A. M....	6	6	8	11	19	12	48	40	8	15	67	80	15	24	55
11 to 12 A. M....	6	6	3	9	21	13	57	50	22	16	61	123	8	12	25
12 to 1 P. M.....	6	6	8	6	9	15	70	55	11	22	173	206	12	11	05
1 to 2 P. M.....	6	6	10	9	22	23	60	49	10	6	127	84	11	11	50
2 to 3 P. M.....	6	6	3	3	16	11	74	40	14	14	92	38	2	1	05
3 to 4 P. M.....	6	6	10	11	10	9	45	25	15	22	70	53	5	6	15
4 to 5 P. M.....	6	6	8	9	10	9	51	40	21	18	76	218	9	11	..
5 to 6 P. M.....	6	6	5	7	17	15	61	61	17	23	170	243	7	11	50
6 to 7 P. M.....	6	6	4	3	14	16	72	109	8	21	102	260	2	2	35
7 to 8 P. M.....	6	6	2	...	7	4	155	80	...	6	131	117	2	..	40
8 to 9 P. M.....	6	6	...	2	2	3	90	59	1	3	97	77	7	6	15
9 to 10 P. M.....	6	6	...	...	...	1	57	46	...	1	29	102	3	2	40
10 to 11 P. M....	6	6	...	...	1	1	40	41	...	...	11	111	...	..	..
Totals	103	107	92	102	214	180	1,087	832	209	214	2,028	2,101	108	...	..
Grand Total.	210		194		394		1,919		423		4,129		108	2 h. 7 m. 50 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

EXHIBIT 6 TO COMPLAINT

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 11, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes Min.	Trains blocked crossing: Total minutes Sec.
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.			
5 to 6 A. M.....	1	3	3	...	4	1	6	3	2	...	20	15	...	1	..
6 to 7 A. M.....	6	6	4	1	10	7	50	23	20	9	495	156	3	2	05
7 to 8 A. M.....	6	6	...	6	16	11	50	24	9	7	159	41	9	16	50
8 to 9 A. M.....	6	6	7	6	17	13	29	30	16	10	170	49	6	7	25
9 to 10 A. M.....	6	6	4	6	14	10	54	44	15	14	69	47	10	8	50
10 to 11 A. M....	6	6	13	14	12	12	50	39	13	14	51	74	9	12	05
11 to 12 A. M....	6	6	12	13	21	9	36	31	11	22	80	108	7	8	..
12 to 1 P. M.....	6	6	3	3	10	9	61	63	15	13	126	164	11	16	40
1 to 2 P. M.....	6	6	13	9	17	8	51	51	13	12	75	86	3	2	55
2 to 3 P. M.....	6	6	10	3	22	9	65	33	15	14	74	48	4	4	40
3 to 4 P. M.....	6	6	6	3	18	16	68	41	4	10	64	43	5	4	..
4 to 5 P. M.....	6	6	4	4	15	18	52	41	8	12	89	203	5	4	15
5 to 6 P. M.....	6	6	4	6	12	16	67	70	6	13	182	243	11	10	55
6 to 7 P. M.....	7	5	1	3	10	15	70	135	6	12	123	277	1	..	35
7 to 8 P. M.....	5	9	...	1	6	9	104	81	1	5	117	97	6	3	15
8 to 9 P. M.....	11	10	...	...	2	3	79	148	3	2	113	62	4	8	..
9 to 10 P. M.....	13	15	...	...	2	5	96	88	3	1	23	46	8	16	50
10 to 11 P. M....	11	12	...	...	5	2	181	50	...	...	24	79	1	..	20
Totals	120	126	84	78	213	173	1,169	995	160	170	2,054	1,838	103	...	..
Grand Total.	246		162		386		2,164		330		3,892		103	2 h. 7 m. 40 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 12, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes	
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.		Min.	Sec.
5 to 6 A. M.....	2	4	...	...	2	...	5	1	6	3	33	11	1	..	00
6 to 7 A. M.....	6	6	6	5	10	1	40	21	19	18	386	205	5	2	05
7 to 8 A. M.....	6	6	7	10	12	7	38	23	15	5	152	41	5	7	10
8 to 9 A. M.....	6	6	3	2	9	11	45	33	24	17	149	29	5	6	15
9 to 10 A. M.....	6	6	6	6	17	14	47	31	22	21	76	58	5	12	15
10 to 11 A. M....	6	7	4	9	25	22	43	43	15	17	42	68	18	21	35
11 to 12 A. M....	7	6	3	3	21	20	42	21	9	17	81	104	14	15	15
12 to 1 P. M.....	6	5	7	4	13	11	48	51	10	18	139	183	9	11	30
1 to 2 P. M.....	6	7	5	8	22	11	47	47	9	15	92	80	3	7	10
2 to 3 P. M.....	7	5	9	15	20	12	56	32	15	15	90	52	10	10	30
3 to 4 P. M.....	6	7	6	10	11	13	60	50	17	17	61	56	6	6	55
4 to 5 P. M.....	6	6	12	3	13	18	69	62	17	9	86	210	4	2	30
5 to 6 P. M.....	6	6	3	5	11	15	73	73	8	15	165	224	13	21	15
6 to 7 P. M.....	5	6	4	5	14	18	69	83	10	8	93	222	2	1	25
7 to 8 P. M.....	6	6	...	...	8	7	79	53	3	9	86	99	5	6	..
8 to 9 P. M.....	6	6	...	...	2	1	80	58	...	2	100	66	4	11	40
9 to 10 P. M.....	6	6	...	...	...	...	63	41	1	...	35	96	3	2	40
10 to 11 P. M....	6	6	...	...	...	1	37	40	...	...	12	64	10	15	55
Totals	105	107	75	85	210	182	941	763	200	206	1,878	1,868	122	...	..
Grand Total.	212		160		492		1,704		406		3,746		122	2 h. 42 m. 5 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

EXHIBIT 8 TO COMPLAINT

Traffic Census at Intersection of Chapel Hill Street and Southern, Norfolk & Western and Seaboard Air Line Railways, Durham, N. C., July 13, 1922

Time	Street cars		Motor vehicles: Hvy. trucks		Motor vehicles: Del. wagons		Motor vehicles: Pass. Autos		Horse-drawn vehicles		Bicycles and pedestrians		Trains blocked crossing: No. of times	Trains blocked crossing: Total minutes Min.	Trains blocked crossing: Total minutes Sec.
	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.	N. B.	S. B.			
5 to 6 A. M.....	1	3	...	...	4	2	2	1	1	3	26	8	...	..	..
6 to 7 A. M.....	6	6	9	3	15	7	30	28	17	19	463	166	1	..	40
7 to 8 A. M.....	6	6	2	1	22	13	36	27	14	11	164	48	6	7	35
8 to 9 A. M.....	6	6	3	2	17	11	50	28	17	21	149	51	4	10	35
9 to 10 A. M.....	7	7	7	14	22	29	47	38	14	10	84	59	7	1	25
10 to 11 A. M....	6	6	8	7	14	14	49	61	11	13	69	71	6	5	25
11 to 12 A. M....	6	6	13	8	9	5	48	58	13	22	105	108	6	9	10
12 to 1 P. M.....	5	5	5	5	11	10	50	42	6	14	122	192	8	19	35
1 to 2 P. M.....	6	6	10	10	13	11	41	56	12	5	88	79	10	10	20
2 to 3 P. M.....	7	6	3	3	14	11	50	39	13	8	64	42	5	9	..
3 to 4 P. M.....	6	6	11	7	15	14	56	51	15	19	61	39	12	15	15
4 to 5 P. M.....	6	6	8	7	24	12	98	48	6	13	108	251	4	7	20
5 to 6 P. M.....	6	5	5	1	14	8	91	67	22	19	161	199	9	23	40
6 to 7 P. M.....	5	5	4	2	4	10	44	78	8	10	109	225	1	..	25
7 to 8 P. M.....	6	6	...	1	4	8	61	63	4	9	136	70	5	3	40
8 to 9 P. M.....	6	6	...	...	2	3	68	61	1	3	64	67	5	4	45
9 to 10 P. M.....	6	6	...	1	3	1	63	48	2	2	22	73	5	7	05
10 to 11 P. M....	6	6	...	...	1	1	36	34	...	...	15	101	4	5	50
Totals	103	103	88	72	208	170	920	828	176	201	2,010	1,849	98	..	..
Grand Total.	206		160		378		1,748		• 377		3,859		98	2 h. 21 m. 45 sec.	

"N. B." denotes Northbound. "S. B." denotes Southbound.

[fol. 34] And the said Southern Railway Company, by its attorneys, Fuller, Reade & Fuller, came and pleaded as follows:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF SOUTHERN RAILWAY COMPANY

Southern Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinances set forth in the complaint), answering the averments of the plaintiff's petition, says:

1. The averments of sub-divisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted, except the portion of said sub-division Fourth, which alleges that this defendant, Southern Railway Company, at all times of day and night constantly moves and switches over this defendant's main tracks, side or spur tracks and across said grade crossing numerous freight trains cars and locomotives for serving industries and this defendant's freight depot.

2. Answering said excepted portion of said sub-division Fourth of the complaint, this defendant, Southern Railway Company, denies that it at all times of day and night constantly moves and switches over its main line tracks, side or spur tracks and across said grade crossing numerous freight cars and locomotives for serving industries and this defendant's freight depot, as alleged in the complaint, and demands that, if material, proof be a*b*duced thereof.

3. Answering the eighth sub-division of the complaint this defendant, Southern Railway Company, denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the [fol. 35] dates and for the times mentioned in the Eighth subdivision of the complaint by this defendant; and demands that, if material, proof be a*b*duced of such blocking of the crossing. Further answering this sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this sub-division of the complaint, and, if material, demands proof thereof, and the same is therefore denied.

4. For a separate and complete defense to the prayer for a writ of mandamus this defendant, Southern Railway Company, shows:

This defendant, Southern Railway Company, denies that the said City of Durham has any legal right or authority under the ordinance adopted on the 20th day of March, 1922, (which ordinance

is set forth in words and figures in the Seventh sub-division of the complaint), or otherwise, to require this defendant to separate the grade of its railroads from the grade of the highway at the Chapel Hill Street crossing in Durham, North Carolina, by means of the underpass required by said ordinance, or by any other means or method, or in any other manner; and to require this defendant to pay all or any part of the expense of such grade separation.

The said ordinance of Durham, adopted on the 20th day of March, 1922, would require the three defendants herein to separate the grade of their railways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place" of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of the defendant, Southern Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3 of the Constitution.

[fol. 36] Under the circumstances of fact hereinafter set forth the construction of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure, and would not constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charking the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Southern Group under existing Federal law. The ordinance is accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by sub-division (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920.

This defendant is an interstate carrier by railroad engaged in interstate transportation and owning, or controlling, and operating — miles of track in the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee and other States, with lines or branches into North Carolina, one of said lines passing through the City of Durham. The other two defendants, Norfolk and Western Railway Company and Seaboard Air Line Railway Company, are also interstate railroad carriers, engaged in interstate and foreign commerce in various States.

The circumstances of fact which establish that said ordinance is unreasonable, arbitrary and void will appear from the facts now to be set forth.

This defendant avers there are other, different, better, less waste-

ful and less uneconomical means of accomplishing such grade separation than by the proposed underpass, such as by means of an overhead structure to carry the highway over the tracks of this defendant and of the other defendants herein; that if it be finally and judicially determined that this defendant and said other defendants [fol. 37] herein, are legally required to make such grade separation and to bear all or any part of the expenses thereof, such an overhead structure would provide a better, much less expensive, less objectionable and less burdensome method or solution of the problem for affording relief from the alleged danger of the grade crossing than would the proposed underpass, and one providing equally as well for the safety of the public. The circumstances of fact which make such an overhead structure a better, less wasteful, less uneconomic and less burdensome solution of the grade separation problem and one providing equally as well for the public safety, and which render the requirement of the underpass, unnecessary, burdensome, arbitrary, unreasonable and void are:

(a) A reasonable first cost of approximately $160,000.00, as contrasted with an unreasanoble first cost of the proposed underpass of $258,800; both exclusive of the property cost and damage.

(b) The overhead bridge causes a minimum property damage because of the purchase of one piece of property fronting about 73 feet on Chapel Hill Street and about 204 feet on Great Jones Street, and another piece of property fronting about 180 feet on Chapel Hill Street, and it does not cause damage to other adjacent property. The proposed underpass would necessitate the approach of the public street to the railroads of the defendants herein from the south side thereof, through a deep cut for approximately two bocks, thereby pacing property abutting Chape Hill Street between said blocks above the new grade of Chapel Hill Street and depriving such owners of the right of access to and from Chapel Hill Street, or seriously interfering with such right. The proposed underpass would thus damage property fronting about 750 feet on Chapel Hill Street, about 430 feet on Great Jones Street and about 195 feet on the improved portion of Pettigrew Street lying east of Chapel Hill Street and about 235 feet on the unimproved portion of Pettigrew Street lying west of Chapel Hill Street. A number of residents living on Chapel [fol. 38] Hill Street are very much opposed to the underpass on account of property damage.

(c) In the construction of an underpass a serious interference with street traffic on Chapel Hill Street and with railroad traffic on all tracks would result, necessitating costly temporary work. This interference would extend over a period of probably twelve months. The underpass with the vertical clearance required by the ordinance would necessitate the elevation, at great expense to this defendant, Southern Railway Company, of the tracks of this defendant at Chapel Hill Street, and to such an extent as to seriously interfere with the economical performance of switching service to and from this defendant's freight depot and industries served by it. On the

other hand a steel and concrete viaduct can be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the streets being such as to cause little interference either to the railroads or to the street traffic.

(d) The proposed overhead bridge or viaduct would provide a maximum approach grade of 7 per cent as compared with a maximum approach grade of approximately 8 per cent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(f) An overhead bridge gives the Railroad Companies the maximum use of their property by providing for seven or more tracks, an advantage which cannot be attained by an underpass for the reason that the space necessary for the steel spans for seven tracks is not available, except by means of the extensive and expensive bridging hereinafter referred to. The overhead bridge provids driveways at street intersections, without change of street grades, while by an un-[fol. 39] derpass material change of street grades would be required at all street intersections.

The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark and damp underpass, requiring artificial illumination on dark or rainy days.

(h) The proposed underpass would necessitate extensive and highly expensive bridging by this defendant, Southern Railway Company, and by the other two defendants herein, for every additional parallel track constructed within the limits of their respective rights of way across said Chapel Hill Street, whereas if an overhead bridge is provided such additional tracks could be built without such bridging or other added cost.

And for a further answer and defense to the matters and things set out in said complaint the defendant, Southern Railway Company, says:

5. That it does not own the right of way over which its trains are operated and under which the proposed underpass will be constructed, but avers and alleges that said right of way, and the tracks thereon, are the property of the North Carolina Railroad Company; that this defendant is merely the lessee of said North Carolina Railroad Company and uses said right of way and tracks by virtue of a lease from it, and it is advised and believes and, therefore, alleges that it has no legal right, and cannot be compelled, to alter and vary the existing condition of said right of way at said Chapel Hill Street

crossing at Durham, North Carolina, to the extent required by the ordinance set out in the first paragraph of the complaint filed herein, and that if this court should require and compel it to make any such change in said right of way it might, and probably would, result in a forfeiture of its rights under said lease, and any such judgment or decree would impair the obligations of the contract of lease, now subsisting between it and said North Carolina Railroad Company, and it hereby expressly pleads the lack of ownership of said right of [fol. 40] way in bar of the relief prayed for in the complaint.

Wherefore, having fully answered, this defendant prays that the writ of mandamus be refused, this action be dismissed, and that it go hence without day and recover its costs.

Fuller, Reade & Fuller, Attorneys for Southern Railway Company.

NORTH CAROLINA,
Durham County:

W. A. Gattis, being duly sworn, says that he is local and managing agent of the defendant, Southern Railway Company, in Durham, North Carolina; that he has read the foregoing answer and it is true of his own knowledge, except those matters and things therein stated upon information and belief, and as to them he believes it to be true.

Wm. A. Gattis.

Subscribed and sworn to before me, this 30th day of August, 1922. Nettie G. Fowler, Notary Public. (Notarial Seal.) My commission expires January 9th, 1924.

And the said Norfolk & Western Railway Company, by its attorney, W. B. Guthrie, came and pleaded as follows:

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF NORFOLK AND WESTERN RAILWAY COMPANY

Norfolk and Western Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinance set [fol. 41] forth in the complaint) answering the averments of the petition says:

1. The averments of subdivisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted.

2. Answering the Eighth sub-division of the complaint this defendant, Norfolk & Western Railway Company, denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the dates and for the times mentioned in the Eighth sub-division of the complaint by this defendant; and demands that, if material, proof be adduced of such blocking of the crossing. Further answering sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this sub-division of the complaint, and if material demands proof thereof, and the same is therefore denied.

3. For a separate and complete defense to the prayer for a writ of mandamus this defendant, Norfolk and Western Railway Company, shows:

The ordinance of Durham, adopted 20 March, 1922, would require the three defendants herein to separate the grade of their railways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place" of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of this defendant, Norfolk and Western Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article 1, Section 8, paragraph 3 of the Constitution.

Under the circumstances of fact hereinafter set forth the construction of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure. An overhead [fol. 42] bridge or viaduct would constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charging the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Eastern Group under existing Federal law. The ordinance is, accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by subdivision (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of 28 February, 1920.

This defendant is an interstate carrier by railroad engaged in interstate transportation of passengers, freight, United States mail, and express, with 2,237.88 miles of track in the States of Virginia, North Carolina, West Virginia, Kentucky, Ohio and Maryland; the

lines in general being from the port of Norfolk west to Columbu Ohio, and in Cincinatti, Ohio, respectively, with branches into Nort Carolina, one terminating at Durham and another at Winston. Th other two defendants, Southern Railway Company and Seaboar Air Line Railway Company, are similarly interstate railroad ca riers, engaged in interstate and foreign commerce in various state

The circumstances which establish that said ordinance is voi will appear from the facts now to be set forth. This defendan Norfolk and Western Railway Company, operates only passeng service over the Chapel Hill Street crossing in and out of the Du ham Union Station, consisting of two trains in each direction du ing each twenty-four hours, and perhaps once each day its shiftin engine passes over said crossing to set off exchange freight cars to i co-defendant, Southern Railway Company; it is careful to stop an flag each train over the crossing and has never had an accident ther [fol. 43] Before the ordinance was passed this defendant made pr posal of a plan for an overhead structure which would have carrie the highway over the tracks of the three railways. This structu would have extended, with approaches from Main Street in Durha to Chapel Hill Street, at proper grades with effective drainage. Th defendant attaches as a part of this answer and return to the con plaint a print of proposed overhead bridge, Chapel Hill Street, Du ham, North Carolina, marked "Exhibit 1", and numbered 10,769 showing the ground plan of the overhead structure, and typical se tion and foundation plans and the side elevation of the propose structure. This overhead crossing would have been a reasonab and proper solution of the problem, thus affording relief from dang of the grade crossing.

The circumstances of fact which made this proposed overhea crossing a reasonable solution are:

(a) A reasonable first cost of approximately $160,000.00, as co trasted with an unreasonable first cost of the proposed underpass $258,800.00, both exclusive of property cost and damage.

(b) The overhead bridge causes a minimum property damage b cause of the purchase of one piece of property, fronting about 7 feet on Chapel Hill Street and about 204 feet on Great Jones Stree and another piece of property fronting about 180 feet on Chap Hill Street, and it does not cause damage to other adjacent pro erty, whereas the proposed underpass would damage property fron ing about 750 feet on Chapel Hill Street, about 430 feet on Gre Jones Street and about 195 feet on the improved portion of Pett grew Street lying East of Chapel Hill Street and about 235 feet o the unimproved portion of Pettigrew Street lying west of Chap Hill Street. A number of residents living on Chapel Hill Street a very much opposed to the underpass on account of property damag

(c) In the construction of an underpass a serious interferen with street traffic on Chapel Hill Street and with railroad traffic o all tracks would result. This interference would extend over a perio of probably twelve months; whereas a steel and concrete viaduct ca

[fol. 44] be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the street being such as to cause little interference either to the Railroads or to the street traffic.

(d) The proposed overhead bridge or viaduct would provide a maximum approach grade of seven per cent., as compared with a maximum approach grade of seven and six-tenths per cent., provided by the proposed underpass.

(e) In eliminating drainage difficulties, which make the underpass objectionable and inherently improper.

(f) An overhead bridge gives the railroad companies the maximum use of their property by providing for seven tracks,—an advantage which cannot be attained by an underpass for the reason that the space necessary for the steel spans for seven tracks is not available. The overhead bridge provides driveways at street intersections, without change of street grade, while by an underpass material change of street grades would be required at all street intersections. The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark underpass, in which it would be difficult to secure and maintain proper drainage.

(h) The construction of an overhead crossing will not interfere with the future elevation of the tracks east of Chapel Hill Street.

Wherefore, this defendant prays that the writ of mandamus be refused and to be hence dismissed with its costs.

Norfolk and Western Railway Company, By N. D. Maher, President. (Corporate Seal.) Attest: L. W. Cox, Assistant Secretary. Wm. B. Guthrie, Attorney for Norfolk & Western Ry. Co.

[fol. 45] STATE OF PENNSYLVANIA,
City and County of Philadelhia:

Be it remembered, that on this 25th day of August, 1922, personally appeared before me the undersigned, a Notary Public of the State of Pennsylvania, N. D. Maher, who, being by me duly sworn according to law, deposes and says that he is President of Norfolk and Western Railway Company and that the facts set forth in the foregoing answer of said Company are correctly and truly stated according to the best of his knowledge, information and belief.

N. D. Maher.

Sworn and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.
Francis P. Malone, Notary Public. (Notarial Seal.) My commission expires January 7, 1925.

NORTH CAROLINA,
Durham County:

Walter H. Pritchard being duly sworn, says that he is the Local Agent at Durham, North Carolina, of the defendant Norfolk & Western Railway Company; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters he believes it to be true.

Walter H. Pritchard.

Subscribed and sworn to before me this the 30th day of August, 1922. Chas. T. Zuckerman, Notary Public. (Notarial Seal.) My commission expires Oct. 29, 1922.

And the said Seaboard Air Line Railway Company, by its attorneys, Fuller, Reade & Fuller, came and pleaded as follows:

[fol. 46] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

SEPARATE ANSWER OF SEABOARD AIR LINE RAILWAY

Seaboard Air Line Railway Company, one of the three defendants to the above complaint (upon which plaintiff prays that a writ of mandamus shall be issued directing the three defendants to comply immediately with the provisions of the ordinances set forth in the complaint), answering the averments of the plaintiff's petition, says:

1. The averments of the sub-divisions of the complaint numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth are true and correct and are accordingly admitted, except the portion of said sub-division Fourth, which alleges that the defendant, Seaboard Air Line Railway Company, at all times of day and night constantly moves and switches over this defendant's main tracks, side or spur tracks and across said grade crossing numerous freight trains, cars and locomotives for serving industries and this defendant's freight depot.

2. Answering said excepted portion of said sub-division Fourth of the complaint, this defendant, Seaboard Air Line Railway Company, denies that it at all times of day and night constantly moves and switches over its main line tracks, side or spur tracks and across said grade crossing numerous freight trains, cars and locomotives for serving industries and this defendant's freight depot, as alleged in the complaint, and demands that, if material, proof be adduced thereof.

3. Answering the Eighth sub-division of the complaint this defendant, Seaboard Air Line Railway Company denies that the crossing at Chapel Hill Street, in Durham, North Carolina, was blocked on the dates and for the times mentioned in the Eighth subdivision of the complaint by this defendant; and demands that, if material, proof be adduced of such blocking of the crossing. Fur-
[fol. 47] ther answering this sub-division Eighth this defendant is not informed as to the user of said crossing set forth in this subdivision of the complaint, and, if material, demands proof thereof, and the same is therefore denied.

4. For a separate and complete defense to the prayer for a writ of Mandamus this defendant, Seaboard Air Line Railway Company, shows:

This defendant, Seaboard Air Line Railway Company, denies that the said City of Durham has any legal right or authority under the ordinance adopted on the 20th day of March, 1922, (which ordinance is set forth in words and figures in the Seventh sub-division of the complaint), or otherwise, to require this defendant to separate the grade of its railroads from the grade of the highway at the Chapel Hill Street crossing in Durham, North Carolina, by means of the underpass required by said ordinance, or by any other means or method, or in any other manner; and or to require this defendant to pay all or any part of the expense of such grade separation.

The said ordinance of Durham, adopted on the 20th day of March, 1922, would require the three defendants herein to separate the grade of their highways from that of the highway at Chapel Hill Street crossing, in Durham, North Carolina, "by the construction of an underpass to take the place," of the present grade crossing, that is, by the construction of an underpass which will carry the highway beneath the tracks of the three railways. In thus requiring the construction of an underpass with proper approaches the ordinance is arbitrary and unreasonable and violates the constitutional rights of this defendant, Seaboard Air Line Railway Company, as not due process of law required by the Fourteenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution.

Under the circumstances of fact hereinafter set forth the construc-
[fol. 48] tion of an underpass for the highway to eliminate the grades would be a wasteful and uneconomic expenditure, and would not constitute that efficient and economical management and reasonable expenditure which by Act of Congress is imposed upon this defendant as a carrier and as a condition of charging the just and reasonable rates prescribed by the Interstate Commerce Commission for interstate transportation in the decisions which have fixed the rates of this and other carriers in the Southern Group under existing Federal law. The ordinance is, accordingly, also void for that compliance therewith would not be that efficient and economical management and reasonable expenditure for the maintenance of way, structures and equipment required by sub-division (2) of Section 15a of

the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the amendments of the Transportation Act of the 28th day of February, 1920.

This defendant is an interestate carrier by railroad engaged in interstate transportation and owning or controlling and operating 3,563.21 miles of track in the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama; its line of railroad in general extending from the City of Richmond, Virginia, to the City of Tampa, Florida, from the City of Portsmouth, Virginia, to Norlina, North Carolina, with lines and branches into North Carolina, one line terminating at Durham, one at Charlotte and one at Wilmington, North Carolina. The other two defendants, Southern Railway Company and Norfolk and Western Railway Company, are also interstate railroad carriers engaged in interstate and foreign commerce in various states.

The circumstances of fact which establish that said ordinance is unreasonable, arbitrary and void will appear from the facts now to be set forth. This defendant, Seaboard Air Line Railway Company, does not operate any through freight or passenger trains over said Chapel Hill Street crossing, and its operation and use of its tracks at said crossing are confined solely to switching operations incident to the handling of freight trains and cars to industrial plants served by it and to its freight depot; and that it is careful to stop and flag [fol. 49] each engine or train over said crossing. This defendant avers there are other, different, better, less wasteful and less uneconomic means of accomplishing such grade separation than by the proposed underpass, such as by means of an overhead structure to carry the highway over the tracks of this defendant and of the other defendants herein; that *it* it be finally and judicially determined that this defendant and said other defendants herein, are legally required to make such grade separation and to bear all or any part of the expense thereof, such an overhead structure would provide a better, much less expensive, less objectionable and less burdensome method of solution of the problem for affording relief from the alleged danger of the grade crossing than would the proposed underpass, and one providing equally as well for the public safety. The circumstances of fact which make such an overhead structure a better, less wasteful, less uneconomic and less burdensome solution of the grade separation problem and one providing equally as well for the public safety, and which render the requirement of the underpass unnecessary, burdensome, arbitrary, unreasonable and void are:

(a) A reasonable first cost of approximately $160,000.00, as contrasted with an unreasonable first cost of the proposed underpass of $258,800; both exclusive of the property cost and damage.

(b) The overhead bridge causes a minimum property damage because of the purchase of one piece of property fronting about 73 feet on Chapel Hill Street and about 204 feet on Great Jones Street, and another piece of property fronting about 180 feet on Chapel Hill Street, and it does not cause damage to other adjacent property. The proposed underpass would necessitate the approach of the public

street to the railroads of the defendants herein from the south side thereof, through a deep cut for approximately two blocks, thereby placing property abutting Chapel Hill Street between said blocks above the new grade of Chapel Hill Street and depriving such owners of the right of access to and from Chapel Hill Street, or seriously interfering with such right. The proposed underpass would thus damage property fronting about 750 feet on Chapel Hill Street, about 430 [fol. 50] feet on Great Jones Street and about 195 feet on the improved portion of Pettigrew Street lying east of Chapel Hill Street and about 235 feet on the uni-proved portion of Pettigrew Street lying west of Chapel Hill Street. A number of residents living on Chapel Hill Street are very much opposed to the underpass on account of property damage.

(c) In the construction of an underpass a serious interference with street traffic on Chapel Hill Street and with railroad traffic on all tracks would result, necessitating costly temporary work. This interference would extend over a period of probably twelve months. The underpass with the vertical clearance required by the ordinance would necessitate the elevation, at great expense to this defendant, Seaboard Air Line Railway Company, of the tracks of this defendant at Chapel Hill Street, and to such an extent as to seriously interfere with the economical performance of switching service to and from this defendant's freight depot and industries served by it. On the other hand a steel and concrete viaduct can be constructed in such a manner as not to interfere either with traffic on Chapel Hill Street or with railroad traffic, the abutments being built entirely in the clear of the traffic and the supports in the streets being such as to cause little interference either to the Railroads or to the street traffic.

(d) Such an overhead bridge or viaduct would provide a maximum approach grade of 7 per cent, as compared with a maximum approach rade of approximately 8 per rcent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(d) Such an overhead bridge or viaduct would provide a maximum approach grade of 7 per cent, as compared with a maximum approach -rade of approximately 8 per cent, provided by the proposed underpass.

(e) In eliminating drainage difficulties and avoiding or minimizing sewer, water pipe and gas pipe removals or relocations, which make the underpass objectionable, unduly expensive and inherently improper.

(f) An overhead bridge gives the Railroad Companies the maximum use of their property by providing for seven or more tracks, an advantage which can not be attained by an underpass for

the reason that the space necessary for the steel spans for seven tracks is not available, except by means of the extensive and expensive [fol. 51] bridging hereinafter referred to. The overhead bridge provides driveways at street intersections, without change of street grades, while by an underpass material change of street grades would be required at all street intersections. The steel girders necessary for the underpass will be dangerous to trainmen switching.

(g) The overhead bridge provides a safer highway on a viaduct, as contrasted with a dark and damp underpass, requiring artificial illumination on dark or rainy days.

(h) The proposed underpass would necessitate extensive and highly expensive bridging by this defendant, Seaboard Air Line Railway Company, and by the other two defendants herein, for every additional parallel track constructed within the limits of their respective rights-of-way across said Chapel Hill Street whereas if an overhead bridge is provided such additional tracks could be built without such bridging or other added cost.

Wherefore, this defendant prays that the writ of mandamus be refused and to be hence dismissed with its cost.

Seaboard Air Line Railway Company, By M. H. Cahill, Vice-President. Fuller, Reade & Fuller, Attorneys for Seaboard Air Line Railway Company.

STATE OF VIRGINIA,
City of Norfolk:

M. H. Cahill, being duly sworn, says that he is an officer, towit: Vice-President, of defendant, Seaboard Air Line Railway Company; that he has read the foregoing answer and it is true of his own knowledge except those matters and things therein stated upon information and belief, and as to them he believes it to be true.

M. H. Cahill.

Subscribed and sworn to before me this 29th day of August, 1922. S. B. Parkinson, Notary Public. (Notarial Seal.) My commission expires 1-6-25.

[fol. 52] I hereby certify this is a case in which, by the laws of Virginia no tax is required upon the seal.

S. B. Parkinson, Notary Public.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(TITLE OF CAUSE)

WRIT OF MANDUMUS

This cause coming on to be heard upon application for a Writ of Mandamus, before the undersigned, His Honor George W. Connor, Judge Presiding in the Tenth Judicial District, the hearing having been continued by consent, and set for hearing at Chambers at Durham on the 16th day of September, 1922 and after hearing read the Complaint and Answers of each of the defendants the argument of counsel for the plaintiff and counsel for the defendants, the Court being of the opinion that no issue of fact for trial by jury is raised upon the pleadings, finds the following facts from the pleadings:

1. That the plaintiff is a municipal corporation of the State of North Carolina, and among other powers in its charter delegated to its City Council the governing authority by Section 10 of its charter is the following:

"The City Council shall have full power and authority, except as otherwise provided for in this act, to exercise all of the powers conferred upon and delegated to the City of Durham by this charter and by the laws of North Carolina. The City Council shall have power to make such ordinances, rules and regulations as it may deem necessary for the proper government of the City to promote and safeguard the health, morals, safety and general welfare and convenience of the public. The City Council may provide for the proper enforcement of such ordinances, in such manner as it may think best, by fine, imprisonment or otherwise."

[fol. 53] That among the powers delegated to said City by Consolidated Statutes of the State of North Carolina, as will appear by reference to Section 2793 thereof, are the following:

"The governing body of the city shall have power to control, grade, macadamize, cleanse, and pave and repair the streets and sidewalks of the city and make such improvements thereon as it may deem best for the public good, and may provide for and regulate the lighting of the public parks, and regulate, control, license, prohibit, and prevent digging in said streets and sidewalks, or placing therein of pipes, poles, wires, fixtures, and appliances of every kind, whether on, above, or below the surface thereof, and regulate and control the use thereof by persons, animals and vehicles; to prevent, abate, and remove obstructions, encroachments, pollution or litter therein; and shall have under its government, management, and control all parks and squares within or without the city limits established by the governing body for the use of the city except as otherwise provided."

Also Section 3449 of the Consolidated Statutes as follows:

"Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city, town, township or road district having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall [fol. 54] be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law."

2. That Chapel Hill Street is one of the main streets or thoroughfares of said municipality, running in an easterly and westerly direction, the western portion of which connects with the Chapel Hill Boulevard of the State Highway leading to the town of Chapel Hill in Orange County; that said street, except for several hundred feet on either side of the right-of-way hereinafter referred to, has recently been permanently paved, and said street is the leading thoroughfare connecting the northern and southern portions of said city, and is used and occupied by the Durham Public Service Company with its tracks over which it operates a line of street railway.

3. That the defendant, Southern Railway Company, operates a line of steam railway over its tracks on its right-of-way, two hundred feet in width, through the City of Durham, crossing said Chapel Hill Street at grade near the center of said city; that the defendant, Norfolk & Western Railway Company operates a line of steam railway over its tracks, located on a portion of the right-of-way of the Southern Railway Company, which said tracks cross Chapel Hill Street at a grade at the point above mentioned; that the defendant, Seaboard Air Line Railway Company, operates a steam railway over its tracks located on the portion of the said right-of-way of the Southern Railway Company, which said tracks cross Chapel Hill Street at grade and point above mentioned.

4. That within a radius of approximately eight hundred yards of said Chapel Hill Street grade crossing are located the freight depots

of each of the defendants, and large industrial plants, all of which [fol. 55] are served with side or spur tracks connecting with the main line track of the defendants; that over said main tracks and across said grade crossing are constantly moved and switched numerous freight trains, cars and locomotives serving said industries and depots, and in addition thereto many through passenger and freight trains.

5. That during the last five years several more or less serious accidents have occurred at said grade crossing; said grade crossing is extensively used by street cars, motor vehicles, horse drawn vehicles and pedestrians.

6. That the governing body of the City of Durham has fully and carefully investigated the conditions existing at this grade crossing and did on the 20th day of March, 1922, adopt an appropriate ordinance as follows:

"Whereas, The Greensboro and Goldsboro line of the Southern Railway crosses Chapel Hill Street at grade, near the center of the City of Durham, North Carolina, and,

"Whereas, the right-of-way of said railway at that location is two hundred feet wide, the same being occupied by the tracks of the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, certain of which said tracks are sometimes used by equipment of other railway companies, tenants of said Southern Railway Company, which location is a part of the freight and switch yard of two of said railway companies, where the shifting of engines cars and trains, both freight and passenger, is a constant practice during the hours of day and night all of which is in addition to the movement of through freight and passenger trains over said tracks, and,

"Whereas, approximately 120 street cars, 260 heavy trucks, 170 delivery wagons, 788 passenger automobiles, 400 horse drawn vehicles with their passengers, drivers and operators, together with 3,600 pedestrians, including many school children, use said grade crossing daily between the hours of seven o'clock A. M., and seven o'clock P. M., and,

"Whereas, the city Council finds and so declares that the con- [fol. 56] tinued maintenance of said grade crossing is dangerous to life, limb and property, and that the safety, comfort, convenience and welfare of the public requires its elimination, and,

"Whereas, the City Council, after having open negotiations with the officials of the said railway companies regarding the said grade crossing, did upon the suggestion of said railway officials, refer the matter to a joint body consisting of the City Manager, City Consulting Engineer and the engineering representatives of the said railway companies for the purpose of reaching an agreeable solution of the elimination of said grade crossing, and,

"Whereas, the Consulting Engineer of the City recommends the said grade crossing can best be eliminated by the building of an underpass, and has submitted plans covering same, and,

"Whereas, the railway engineers have submitted in addition to plans for an underpass, counter-plans for a bridge, and,

"Whereas, the City Council, after full and careful consideration, finds and so declares that an underpass instead of a bridge will better meet the needs, safety, convenience and welfare of the public, and that the same can be constructed for the same cost or less than the cost of the bridge, and,

"Whereas, the City Manager and Consulting Engineer report that they and the railroad engineers are substantially agreed upon a general plan for an underpass; be it therefore, "Ordained by the City Council of the City of Durham."

Section 1. That the grade crossing at Chapel Hill Street occupied and used by the Southern Railway Company, Seaboard Air Line Railway Company and the Norfolk & Western Railway Company, and occasionally by tenant roads of the said Southern Railway Company, is a menace to the public safety, is dangerous to life, limb and property, and the City Council finds and so declares that the safety, comfort and convenience and welfare of the public requires the elimination of said grade crossing by the construction of an underpass to take the place thereof.

Section 2. That the Southern Railway Company, Seaboard Air [fol. 57] Line Railway Company and the Norfolk & Western Railway Company, which said railway companies are now occupying and using tracks crossing the said Chapel Hill Street at grade are hereby ordered and directed to eliminate said grade crossing by constructing an underpass with proper approaches in the place thereof.

Section 3. That the said underpass structure shall have a minimum overhead clearance of thirteen feet; that center supports, if used, must not be more than eighteen inches in thickness, the center line of which must be concentric with the center line of Chapel Hill Street, as established by the City Engineer; that the horizontal clearance between the centre supports and the curb on each side shall not be less than twenty feet, that the sidewalks through said underpass shall not be less than six feet wide in the clear; that the abutment walls shall set flush with or back of the building lines as established by the City Engineer, that the finished surface of Chapel Hill Street at the apex of the crown shall not be lower than El. 383.5 as referred to the standard bench mark datum of the Engineering Department of the City of Durham; that solid non-leakable floors shall be provided in the super-structures, that the detail plans for said underpass shall be submitted to the City Engineer for his criticism and shall be approved by him before the beginning of construction work.

Section 4. That the active construction work on said underpass shall be started not later than sixty days from that adoption of this ordinance and same shall be completed within two hundred and eighty working days thereafter.

Section 5. That this ordinance shall take effect from and after the 20th day of March, 1922."

7. That the continued maintenance of said grade crossing is very dangerous to life, limb and property, is a menace to the public safety and detrimental to the comfort, convenience and welfare of the people; that the elimination of said grade crossing and the removal of this danger is necessary and required for the public safety; that the safety of life, limb and property, and the comfort, convenience [fol. 58] and welfare of the public and public safety, require and will be subserved and promoted by the construction of an underpass under said crossing with the proper approaches thereto, all as is provided for in said ordinance above set out.

Upon the foregoing findings of fact the court finds that the City of Durham had ample authority under its police powers and the several statutes applicable to enact the ordinance above set out, and that said ordinance is valid and reasonable, and was not arbitrarily or capriciously passed, but was enacted with a view solely to protecting the public safety, it is therefore.

Ordered, and the Southern Railway Company, Norfolk & Western Railway Company and the Seaboard Air Line Railway Company are commanded forthwith to eliminate and abolish the grade crossing on Chapel Hill Street in the City of Durham, by constructing an underpass with proper approaches thereto, all as provided for and directed by the ordinance hereinbefore set out.

The defendants are further ordered and commanded to begin the active construction work on said underpass not later than sixty days from the sixteenth day of September, 1922, and to prosecute the construction of said underpass with due and proper diligence and to complete the same within two hundred and eighty working days after the beginning of the active construction work.

The City of Durham agrees to do all underground work such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also sidewalks.

The City of Durham hereby consents that the defendants, its officers, agents and employees shall have the right and privilege to enter upon that portion of Chapel Hill Street and the sidewalks adjacent thereto, which may be necessary to be entered upon, and such other streets as enter into Chapel Hill Street, to properly construct said [fol. 59] underpass and to properly construct the approaches thereto; and the City of Durham further consents that the defendants may lower the grade of Chapel Hill Street to such elevation as may be proper and necessary for the construction of said underpass and the approaches thereto, in conformity with the plans and specifications of the City Engineer of the City of Durham.

Geo. W. Connor, Judge Presiding in the Tenth Judicial District.

Exceptions

To the foregoing order and judgment each and all of the defendants except and assign the same as error and appeal to the Supreme Court.

Exception No. 1.

Notice of appeal given in open court and waived. Appeal bond in the sum of $200.00 is adjudged sufficient.

By consent the following shall constitute the case on appeal:

1. Summons
2. Complaint
3. Answer Southern Rwy. Co.
4. Answer Norfolk & Western Rwy. Co.
5. Answer Seaboard Air Line Rwy. Co.
6. Order and judgment.

The enforcement of the foregoing order and judgment is stayed pending the appeal and hearing thereon of defendants to the Supreme Court.

Dated at Durham, N. C., this September 16th, 1922.

Geo. W. Connor, Judge etc.

The defendants, each and all of them, and in apt time made the following motions:

[fol. 60] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Southern Railway Company

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact raised herein by its answer can be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina.

This September 16, 1922.

Fuller & Fuller, Attorneys for Southern Railway Company.

The foregoing motion is overruled, and the above named defendant excepts.

Exception No. 2.

Geo. W. Connor, Judge Presiding.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Seaboard Air Line Railway Co.

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact [fol. 61] raised herein by its answer can be decided by a jury at the

next regular term of the Superior Court of Durham County, North Carolina.

This September 16th, 1922.

Fuller & Fuller, Attorneys for Seaboard Air Line Railway Company.

The foregoing motion is overruled, and the above named defendant excepts.
Exception No. 3.

Geo. W. Connor, Judge Presiding.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

Motion of Norfolk & Western Railway Co.

The above named defendant hereby moves the Court to continue this action and proceed no further therein until the issues of fact raised herein by its answer can be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina.

This September 16th, 1922.

W. B. Guthrie, Attorney for Norfolk & Western Ry. Co.

The foregoing motion is overruled, and the above named defendant excepts.
Exception No. 4.

Geo. W. Connor, Judge Presiding.

[fol. 62] NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

Exceptions Grouped and Numbered

Exception No. 1

The action of His Honor in signing the order and judgment set out in the record (pages 37, 38, 39, 40, 41, 42, 43 and 44).

Exception No. 2

The action of His Honor in over-ruling the motion of defendant Southern Railway Company as set out in the record (page 45).

Exception No. 3

The action of His Honor in over-ruling the motion of defendant Seaboard Air Line Company as set out in the record (page- 45 and 46).

Exception No. 4

The action of His Honor in over-ruling the motion of defendant Norfolk & Western Railway Company as set out in the record (page 46).

In Superior Court of Durham County

Assignments of Error

1. His Honor erred in his failure to hold that the pleadings raised an issue of fact triable by a jury and the same is assigned as error.

1a. His Honor erred in over-ruling the motions of the defendants to continue the consideration and trial of this action until the issues of fact raised by their answers could be decided by a jury at the next regular term of the Superior Court of Durham County, North Carolina. (Record, pages 45 and 46.)

2. His Honor erred in holding as matter of law and without evi- [fol. 63] dence that the facts set up in the answers of the three defendant railway companies did not constitute a defense by the averments that an overhead bridge would be reasonable and that the underpass required by the ordinance is arbitrary and unreasonable as a restraint upon interstate commerce inhibited by Article I, Section 8, Paragraph 3 of the Constitution.

3. His Honor erred in holding as matter of law and without evidence that the facts set up in the answers of the three defendant railway companies did not constitute a defense by the averments that such overhead bridge would constitute efficient and economic management and reasonable expenditure imposed upon the interstate carriers by Section 15a, Sub-division (2), of the Act of Congress known as the Act to Regulate Commerce as amended by the Transportation Act of 28 February, 1920, and these holdings are assigned as error.

4. His Honor erred in assuming jurisdiction of this proceeding, for that jurisdiction to try and determine matters of the kind referred to in the complaint is vested fully and exclusively in the Corporation Commission of North Carolina, which is a Court of Record, and which by Section 1048 of the Consolidated Statutes of North Carolina is vested with the jurisdiction of the relief sought in this proceeding, and said Commission is directed and empowered, to require the raising or lowering of any tracks or highways at any highway or railroad crossing, and to designate who shall pay for the same; and when they think proper to partition the costs of abolishing grade crossings, or the raising or lowering of said tracks or highways among

the railroads and municipalities interested, and in His Honor's assuming jurisdiction of this proceeding the same is assigned as error.

5. His Honor erred in his failure to hold as prayed for by defendants in their answers that the ordinance in question of the plaintiff City is arbitrary and unreasonable and violates the constitutional rights of defendants as not due process of law required by the Four-[fol. 64] teenth Amendment of the Constitution of the United States, and as an unreasonable imposition and restraint upon interstate commerce inhibited by Article I, Section 8, paragraph 3 of the Constitution. And the failure of His Honor to so hold is assigned as error.

6. His Honor erred in his failure to hold as prayed for by defendants in their answers that a compliance by the defendants with the ordinance in question of plaintiff City would not be that efficient and economical expenditure for the maintenance of way, structures and equipment by subdivision (2) of Section 15a of the Act of Congress known as the Act to Regulate Commerce, added thereto by one of the Amendments of the Transportation Act of February 28th, 1920. And the failure of His Honor to so hold is assigned as error.

7. His Honor erred in entering the order and judgment set out in the record granting to the plaintiff City the relief prayed for and the same is assigned as error.

Dated this the 16th day of September, 1922.
Fuller, Reade & Fuller, W. B. Guthrie, Attorneys for Defendants, Appellants.

Filed this the 17th day of October, 1922.
W. H. Young, Clerk Superior Court, Durham County, N. C.

North Carolina,
Durham County:

In the Superior Court

(Title of Cause)

Stipulation as to Exhibit No. 1

It is hereby stipulated and agreed between the above named plaintiff and the above named defendants that Exhibit I referred to in the answer of the defendant, Norfolk & Western Railway Company, numbered 10769 c, showing the ground plan of the overhead structure and typical section and foundation plans and the side elevation thereof, which said overhead structure is referred to in the answers of the above named defendants, need not be printed as a part of [fol. 65] the transcript of the record on appeal to the Supreme Court of North Carolina in the above case, but that the defendants may furnish five copies thereof for use by the Supreme Court and one or

more copies to the plaintiff, and that said five copies, or other copies thereof, may be referred to and used in the argument and briefs in the Supreme Court.

The City of Durham, By S. C. Chambers, Attorney. Southern Railway Company, By Fuller & Fuller, Attorneys. Norfolk & Western Railway Company, By W. B. Guthrie, Attorney. Seaboard Air Line Railway Company, By Fuller & Fuller, Attorneys.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

APPEAL BOND

Whereas, in the above entitled action judgment was rendered on the 16th day of September, 1922, at Durham Superior Court by His Honor, George W. Connor, Judge presiding, in favor of the above named paintiff and against the above named defendants, from which judgment said defendants appealed to the Supreme Court of North Carolina, and His Honor adjudged that said defendants should execute an appeal bond in the sum of Two Hundred Dollars.

Now, therefore, the undersigned, Southern Railway Company, Norfolk & Western Railway Company, and Seaboard Air Line Rail- [fol. 66] way Company, as principals, and L. D. Kirkland, as surety, undertake in the sum of Two Hundred Dollars to pay to the plaintiff all such costs as may be adjudged against said defendants by the Supreme Court of North Carolina on account of said appeal.

This 28th day of October, 1922.

Southern Railway Company, By Fuller & Fuller, Attorneys. Norfolk & Western Railway Company, By W. B. Guthrie, Attorney. Seaboard Air Line Railway Company, By Fuller & Fuller, Attorneys. L. D. Kirkland. (Seal.)

Filed, accepted and approved this the 28th day of October, 1922. W. H. Young, Clerk Superior Court, Durham County, North Carolina.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

[Title omitted]

STIPULATION FOR AMENDMENT OF CASE ON APPEAL

Agreement and Stipulation

The City of Durham hereby agrees that the case on appeal to the Supreme Court in the above entitled action as settled by His Honor George W. Connor, Judge of the Superior Court, who rendered the [fol. 67] judgment from which this appeal is taken, may be amended by adding thereto motions in writing by each of the defendants demanding that the alleged issues of fact raised by their answers should be referred to a jury for determination and that the Court should not proceed further in this action until such issues were so determined: the statement that the Judge overruled said motions and that the defendants excepted; also by adding an additional assignment of error by the defendants alleging that the trial Judge committed error in overruling the motions above referred to; and this agreement and stipulation.

S. C. Chambers, Attorney for City of Durham. W. B. Guthrie, Fuller & Fuller, Attorneys for Defendants.

NORTH CAROLINA,
Durham County:

IN THE SUPERIOR COURT

(Title of Cause)

CLERK'S CERTIFICATE

I, W. H. Young, Clerk of the Superior Court of Durham County, State of North Carolina, do hereby certify that the foregoing is a full, true and perfect transcript of the record in a civil action pending in said Court, wherein the City of Durham is plaintiff and the Southern Railway Company, Norfolk & Western Railway Company and the Seaboard Air Line Railway Company are defendants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court, at my office in Durham, on this 6th day of November, 1922.

W. H. Young, Clerk of the Superior Court of Durham County.

[fol. 68] IN THE SUPREME COURT OF NORTH CAROLINA

DOCKET ENTRIES

Appeal from Superior Court Durham County docketed 16 January 1923; case argued 27 March 1923; opinion filed 4 April 1923 as follows:

[fol. 69] NORTH CAROLINA SUPREME COURT SPRING TERM 1923

#331. Durham

[Title omitted]

Appeal by Defendants from an Order for Mandamus Made by Conor, J., at Chamber, in Durham, 16 September, 1922

OPINION

The plaintiff made application for mandamus to compel the railroad companies to eliminate the grade crossing on Chapel Hill street over the railway tracks of the defendants and to build an underpass under said tracks. Chapel Hill street is one of the main streets for traffic in said city connecting the northern and southern portions of the city and leading from Durham to Chapel Hill. The three defendant railroads have tracks crossing that street on a grade on which are operated both passenger and freight cars. It is alleged and not denied that in a radius of approximately 800 yards of this Chapel Hill street grade crossing are located the freight depots of all three defendants, large tobacco plants and factories, ice and power plants, flour mills, hosiery mills, all of which depots and industries are served with side or spur tracks connected with the main line tracks of the defendants over which are operated constantly, during day and night, passenger trains, freight trains and switching engines.

In paragraph 5 it is alleged that several accidents have occurred at this grade crossing in which people, animals and vehicles have been injured.

In paragraph 6 it is alleged that the governing authorities of the city of Durham, finding that the continued maintenance of said grade crossing is a great inconvenience to the whole people, seriously interrupting and impeding street traffic and is dangerous to public travel, employed and expert consulting engineer to advise said governing authorities of the said city if it were practicable and feasible to change or alter said grade crossing in order that the same might be made safe and convenient for the traveling public and that said engineer after full investigation recommended that said grade crossing could best be made safe by separating the street and railroad grades and passing the street underneath the railroad tracks by means of an underpass and that the said city council invited the de-
[fol. 70] fendants to have their representatives meet with it and its

representatives with the view of having said defendants remedy said grade crossing by the building of an underpass in the place thereof. And that many conferences were held by and between engineer of the city and the defendant companies which resulted in no definite or satisfactory agreement.

In paragraph 7 of the complaint it is alleged that on 20 March 1922, the city council, the governing authorities of the city of Durham, adopted an ordinance which after reciting the above facts, directed that the grade crossing should be eliminated by the construction of an underpass for the street and directing the defendant railroad companies to eliminate said grade crossing and construct the underpass with proper approaches, fixing the width and height of the underpass and its method of construction and also directing that the said work be begun within 60 days and completed within 280 working days thereafter, and that a copy of said ordinance was duly served upon the said defendant railroad companies.

In paragraph 8 of the complaint it is alleged that the city caused to be made a record of the street traffic along and over said street and over said grade crossing, which record is attached to the exhibits to the complaint, showing an average of nearly 4,000 pedestrians and bicycles had crossed this grade crossing a day; over 500 horse-drawn vehicles and more than 2,000 passenger automobiles, more than 350 delivery wagons, over 100 heavy trucks and over 200 street cars; and that there were more 100 times during the same hours, towit: from 5 o'clock in the morning until 11 o'clock at night, the trains and switch engines crossing Chapel Hill Street blocked the crossing between those hours a total obstruction of 1¾ hours per day.

The railroad companies answered admitting the averments above recited with the qualification that they did not at all times of day and night move the trains over said crossing and they denied that the crossing at Chapel Hill street was blocked to the extent alleged in the complaint and also in a separate defense alleged that an overhead bridge would be more economical to construct than an underpass; that the requirement of the building of an underpass was unreasonable and oppressive and a burden upon Interstate commerce and not [fol. 71] permitted by the Transportation Act of Congress and that the ordinance of the City of Durham was arbitrary and not due process of law, was a violation of the commerce clause of the Constitution and that the jurisdiction to require the raising or lowering of the tracks at a highway crossing was exclusively with the Corporation Commission of the State of North Carolina.

The railroad companies also moved that the action be continued and no order be made therein until the issues of fact raised could be decided by a jury at a regular term of the Superior Court of Durham County. The court overruled the motion and defendants excepted. From the judgment granting a mandamus, the defendants also excepted and appealed.

S. C. Chambers, J. S. Manning and W. J. Brogden for plaintiff.

Fuller & Fuller, W. B. Guthrie, Manly, Hendren & Womble, L. E. Jeffries, Theodore W. Reath and Jas. F. Wright for defendants.

CLARK, C. J.:

The refusal by the court of the motion to continue the hearing and transfer the case to the civil issue docket of the Superior Court for trial by jury was not erroneous for no issues of fact are raised by the answer. The defendants rely upon C. S. 868 but the relief sought by the plaintiffs is not for the enforcement of a money demand and that Sec. authorizes the summons to be returnable before the judge at chambers not less than ten days after service of summons in the complaint, "at which time the court, except for good cause shown, should hear and determine the action both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court upon the motion of either party to continue the action until the issue of fact can be decided by jury at the next regular term of the court". The contention of the defendants is that the answer raised issues of fact because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of the traffic over this grade crossing to the extent averred in paragraphs 4 and 8 of the complaint; but neither of these denials raised an issue of fact. Neither did the assertion in the answer that the underpass would be more expensive than a bridge and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable and oppressive. These defenses raised no issues of fact to be tried by jury and the latter was a question of fact for the court. [fol. 72] In Lee v. Waynesville, 184 N. C., 565, it was held that the courts will not interfere with the statutory discretionary powers given to the governing authorities of an incorporated town to take land from adjoining owners in widening its streets for the public welfare unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion under C. S. 2791, 2792, citing numerous cases.

It is admitted in this case that this Chapel Hill street is one of the main streets and most important thoroughfares in the City of Durham, connecting as it does the northern and southern section of the city and is the thoroughfare leading from Durham to Chapel Hill. It is traversed by thousands of people daily and the question whether or not the public safety demanded elimination of the grade crossing was one in the legislative power of the governing authorities of the city of Durham and their decision is conclusive and final unless it was shown that it is clearly oppressive or amounts to abuse of their discretion. The denial as to the number of times a day the crossing was broken by passenger and freight trains or switch engines, and of the exact number of pedestrians, bicycles, authomobiles and other vehicles crossing per day is clearly a mere evidentiary matter and does not constitute issues of fact in view of the admission that Chapel Hill street is one of the main streets or thoroughfares in said city over which so large a volume of traffic and travel passes every day. This court has repeatedly held that mere evidentiary matters do not raise issues of fact. This is clearly stated in Edgerton v. Kirby, 156 N. C., 347, and also in Jackson v. Telegraph Company, 139 N. C., 347, in which the court said: "We do not approve of issues which as in this case embody evidentiary facts instead of the ultimate facts to

be found by the jury and which are therefore the only issuable facts. Grant v. Bell, 87 N. C. 34; Patton v. R. R., 96 N. C., 455."

The city made out a prima facie case when it showed the enactment and passage of the ordinance, which was admitted by the three railroads. The judge properly held that a presumption existed in favor of the validity of the ordinance and the burden was upon the railroad to show otherwise which they declined to do. The judge was ready to [fol. 73] hear and determine the action but the railroads failed to offer testimony or evidence of any kind whatever. It did not devolve upon the city to prove that the crossing was blocked on the dates mentioned to the exact extent as alleged in the complaint as the burden of proving the ordinance invalid or unreasonable was on the defendants either by showing that in fact the railroads did not block the crossing; that traffic was not impeded; and that the crossing is not dangerous. That the governing body exceeded its powers, or committed fraud and opression, constituting a manifest abuse of discretion are questions of law for the court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court. Crotts v. Winston, 170 N. C., 27; Small v. Edgerton, 146 N. C., 527; Tate v. Greensboro, 114 N. C. 399. There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressive before it can become an issue of fact for the jury.

The defendants contend, however, that by reason of the enumeration of certain powers in the city charter, among others, "To require railroad companies to erect gates at crossings or to place flagmen to warn the public of the approach of trains," restricted the city's right to exercise only the powers specifically mentioned and that C. S. 1048 confers upon the Corporation Commission sole jurisdiction over the subject matter of this controversy. But the last paragraph of Sec. 48 of the city charter recites that the powers enumerated therein "Shall not be held or deemed to be exclusive"; that it shall have all the powers conferred by the several statutes applicable.

This question, which is the one most relied upon by the defendants in this cause, was fully settled in R. R. v. Goldsboro, 155 N. C., 362, where this court said: "The plaintiff earnestly contends that inasmuch as Rev. 1097 (10) (now C. S. 1048) authorized the Corporation Commission to require the raising or lowering by a railroad of its track or highway at any crossing and to designate who shall pay for the same, this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities but is supplemen- [fol. 74] tary merely." In that case R. R. v. Goldsboro, the exact point is so fully and clearly discussed with citations of Federal decisions and decisions from other states that it is unnecessary to repeat what is there said.

Our decision in that case was affirmed on a Writ of Error, R. R. v. Goldsboro, 232 U. S. 548, and in the citations at the end of that opinion in the Anno. Ed.

Since that volume was annotated, the case has since been reaffirmed in Borden v. R. R., 175 N. C. 179; Powell v. R. R., (Hoke, J.) 178 N. C., 245; In re Utilities Co., 179 N. C. 159, 160; Goff v. R. R., Ib. 224; Raleigh v. Power Company (Brown, J.) 180 N. C. 237; Durham v. Public Service Company, 182 N. C., 338.

The findings of fact by the city in the exercise of its legislative and police powers made out a prima facie case and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness. Only two questions can arise: (1) Did the city possess the power to enact the ordinance; (2) Is the ordinance a reasonable exercise of the power?

Full power has been conferred upon the governing body of the city to enact such ordinances as are necessary to promote and safeguard the health, safety and general welfare of the public. Besides the powers expressly given in the charter, the city possesses the powers conferred by Chap. 136, Laws 1917, and the last paragraph of Sec. 48 of the Charter of Durham, Chap. 42, Private Laws 1921, read as follows: "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated or implied herein, the City of Durham, either through its city council or through such other officers as may be provided, shall have and may exercise all other powers which under the Constitution and laws of N. C., now are, or hereafter may be granted to cities."

The city having exclusive control of its streets, the question in the first instance was one for the local authorities. McQuillan, 7 Municipal Corporations, Sec. 955.

In St. Paul v. R. R., L. R. A. 1917-C, 1174, the Court said: "The determination that public necessity requires a separation of crossing grades and the method of accomplishing it, is in the first instance a legislative act for the common council," and further, "The separa-
[fol. 75] tion of grades may be effected either by compelling the railroad to depress its tracks and carry the street over them, or by compelling it to carry the street over or under the crossing grade of the railroad, as reasonable public necessity may require."

The ordinance in this case was enacted under an exercise of the police power and authority conferred in the charter and the several statutes applicable.

In Powell v. R. R., 178 N. C., 245, this Court said: "The right of the city government both under its police powers and the several statutes applicable to require railroads to construct bridges along streets running over their tracks, is fully established in this jurisdiction and is recognized in well-considered cases elsewhere."

In Minneapolis v. R. R., 28 L. R. A. (N. S.) 306, the Court said: "The tendency of modern development is in the direction of greater, rather than more restricted, use of police power, and necessarily so in order to meet the new dangers and increase of old dangers, constantly occurring as natural incidents of advancing civilization. We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything that goes to make a crossing safe for public use is as essentially within police regulations as

any part of it." This was cited in R. R. v. Goldsboro, 155 N. C., at p. 360 (affirmed on writ of error, U. S. Supreme Court 232 U. S.)

R. R. v. Goldsboro was cited with approval in R. R. v. Omaha, 235 U. S., 121, where it is held: "A railway company may, consistently with due process of law, be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, the consequent cost to the company being, as a matter of law damnum absque injuria, are deemed to be compensated by the public benefit which the company is supposed to share" * * * "The necessity of the viaduct and the manner of its construction, were primarily vested in the discretion of the city authorities * * *."

In R. R. v. Minneapolis, 115 Minn. 460, Ann. Cas. 1912-D 1029, [fol. 76] the Court says: "The general rule so established is that where the safety, convenience or welfare of the public require that a railway company carry its tracks over a public way, or the public way over its tracks, by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved police power of the State. A railroad though constructed first in time, is constructed subject to the implied right of the State to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable adjustment of its tracks as will permit the exercise of the superior public right."

The Supreme Court of the United States in affirming R. R. v. Goldsboro, 232 U. S. 430, says: "It is well settled that railroad corporations may be required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

In the recent case of R. R. v. Utility Commrs., 254 U. S. 394, Mr. Justice Holmes, speaking for the Court says: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put in the same proposition in another form, the authority of the railroad to project their moving

[fol. 77] masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

As held in Superior v. Roemer, 154 Wis., 250, a railroad company is bound by the rules of common law to build, at its own expense, a viaduct necessitated by the construction of its railroad across an existing highway, and a city in the authorized exercise of the police power, may require a railroad company to construct the necessary viaduct; "Whenever it is reasonably necessary for the convenience and safety of the travelling public, it is the duty of a railroad company to viaduct or bridge its tracks at their intersection with streets. This duty exists at common law." St. v. R. R. Co. 122 Minn. 280.

In R. R. v. Railroad Commission, 176 Ind. 428, which was a suit to compel the railroad company to separate a grade crossing by constructing the highway under the grade of the railroad, the Court said: "It is well settled in this State that the right of a railroad company to cross a highway with its tracks carries with it the duty on the part of the company to restore the highway to, and keep it in, its former condition of usefulness and safety, and if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway, or the highway over or under its tracks."

In R. R. v. State, 158 Ind. 189, the Court held that when a grade crossing as constructed by a railroad company is dangerous to life and property, and interferes with the free use of the highway, the railroad company may be compelled to construct a crossing under the railroad, if that is necessary to afford security to life and property [fol. 78] and to place the highway in such condition as not unnecessarily to impair its usefulness, or interfere with the free use thereof, as required by law.

In R. R. v. Hopkins County, 153 Ky. 718, the Court held that a railroad company may be required to carry its own tracks over a highway by means of a bridge and that this rule applied to all cases where public safety, convenience or public welfare required such bridge.

In Denver v. R. R., 20 Colo. 186, it was conceded that a state or duly authorized municipality, has power to compel a railroad company to construct a viaduct along a street over its tracks, provided there is reasonable public necessity therefor.

In People v. R. R., 149 N. Y. Supp. 315, the Court says: "That the State has a right to compel a railroad company at its own expense to eliminate crossings at grade by a depression of its tracks and

the erection of bridges to carry streets over its right of way is too well recognized to admit of discussion."

The State in the exercise of the police power, may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street crossings as may be necessary for the safety and protection of the public. Omaha v. R. R. 94 Neb. 556.

In Chattanooga v. R. R., 128 Tenn. 399, the Court held that under the common law a city could require a railroad to construct and maintain at its expense a proper bridge at a street crossing over its tracks and stated that it was so held in 1859 in R. R. v. State, 3 Head (Tenn.) 523, and in Dyer Co. v. R. R., 87 Tenn. 712.

The defendants having failed to comply with the terms of the ordinance, mandamus was the proper remedy to pursue. "Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by mandamus. This duty may exist and be enforced by mandamus even though there is no express provision in the charter or statute, in regard to the erection of viaducts or bridges. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus in a leading case, it appeared that the railroad company's charter empowered the [fol. 79] company to lay its tracks across any public highway or street, in such condition or state of repair, as not to impair or interfere with its free and proper use. It was held that this was a continuing duty, and although the crossing might have been adequate when constructed, yet by reason of the increase of business of the railroad, or of travel upon the street, the crossing became dangerous, or obstructed such travel, the company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks it was further held that the mandamus would lie to compel the railroad to construct such viaduct, including the abuttments and approaches as well as the bridge for the tracks". Elliott on Railroads, Vol. 3, Sec. 1111.

Appellants contend that the ordinance is void for that compliance with same would not be that efficient and economical management and a reasonable expenditure for structures by the carriers as required by sub-division 2, section 15a of the Interstate Commerce Act as amended by the Transportation Act. But nothing in the Interstate Commerce Act or the Transportation Act contravenes the right of the State to invoke the supreme law—an inherent right—to legislate in the interest of public safety.

In Glenn v. Express Co., 170 N. C., 293, Justice Allen quotes from Sherlock v. Alling, 93 U. S. 99, approved in Plumly v. Mass., 155 U. S. 473, as follows: "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country". Continuing, Justice Allen said: "The police power is one originally and always belonging to the States, and was not surrendered by them to the General Government."

As Justice Holmes said in R. R. v. Commrs., 254 U. S. 410: "To engage in interstate commerce the railroad must get on the land; and, to get on to it, must comply with the conditions imposed by the State for the safety of its citizens."

Affirmed.

[fol. 80] NORTH CAROLINA SUPREME COURT, SPRING TERM, 1923

No. 331. Durham County

[Title omitted]

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court of Durham County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed. And it is considered and adjudged further, that the defendants and sureties do pay the costs of the appeal in this Court incurred, to-wit, the sum of Forty 75/100 dollars ($40.75), and execution issue therefor.

[fol. 81] SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

I, Edward C. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the proceedings in this Court in a cause entitled, City of Durham vs. Southern Railway Company, Norfolk & Western Railway Co., and Seaboard Air Line Railway Co.

Witness my hand and seal of said Court at office in Raleigh this 15 May, 1923.

Edward C. Seawell, Clerk of the Supreme Court of North Carolina. [Seal of the Supreme Court of the State of North Carolina.]

Endorsed on cover: File No. 29,642. North Carolina Supreme Court. Term No. 339. Southern Railway Company, Norfolk & Western Railway Company, and Seaboard Air Line Railway Company, plaintiffs in error, vs. The City of Durham, North Carolina. Filed May 23rd, 1923. File No. 29,642.

Map in back of vol. in pocket.